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Chang Yoke Yee & Anor v Kinta Riverfront Hotel & Suites Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(IM)(NCVC)-1628–08 OF 2018
VERNON ONG, KAMARDIN HASHIM AND YEW JEN KIE JJCA
15 JULY 2019

C *Civil Procedure — Striking out — Writ and statement of claim — Plaintiffs sued defendant for defamation based on averments defendant had made in statement of defence filed in another suit — Defendant applied to strike out defamation action on ground what it averred in statement of defence protected by absolute privilege — Whether High Court wrong to strike out defamation action* D *summarily — Whether issue of whether defendant entitled to defence of absolute privilege could only be decided after full trial — Whether case not plain and obvious one for summary striking out — Rules of Court 2012 O 18 r 19*

E The appellants sued the respondent and another individual ('Voon') in the High Court for defamation based on certain averments the respondent had made in its statement of defence in another suit in the sessions court between the same parties. Upon the appellants' application in that suit, the sessions court had expunged six paragraphs, allegedly defamatory of the appellants, from the respondent's statement of defence there. The respondent never F appealed against the order of expungement. In the High Court defamation action, the respondent applied to strike out the action under O 18 r 19 of the Rules of Court 2012 ('the ROC') on the ground that the averments it made in the statement of defence in the other suit were protected by absolute privilege. The High Court agreed and struck out the action. In the instant appeal against G the decision, the appellants submitted that the respondent was not protected by absolute privilege once the impugned paragraphs in the statement of defence were expunged by the sessions court and therefore ceased to be part of the court proceedings.

H **Held,** allowing the appeal, setting aside the striking out order and reverting the matter back to the High Court for full trial:

(1) The issue of whether the respondent was entitled to the defence of absolute privilege had to be decided after a full trial. Based on the facts I and pleadings, the instant case was not a plain and obvious one for striking out under O 18 r 19 of the ROC 2012. The action was not frivolous or vexatious, nor were the pleadings an abuse of process of the court (see paras 23–24).

(2) It was the appellants' pleaded case that the respondent's impugned

statements diverted from the subject-matter of the appellants' claim against the respondent which was premised on the tort of negligence. It was alleged that during a commotion, the appellants were assaulted by Voon after breaking and entering into a hotel room occupied by the appellants due to the negligent conduct of the respondent. This court agreed that the impugned statements were baseless, frivolous, vexatious and embarrassed the appellants and was rightly expunged by the sessions court (see para 14).

(3) Even though the impugned statements were expunged, they were contained in the statement of defence filed in court and were therefore read by the court staff and those present in open court as well as by the staff in the respondent's solicitor's office. Although the alleged defamation was confined to a small circle of people, that should not be a reason to strike out the appellants' writ and statement of claim against the respondent (see para 21).

[Bahasa Malaysia summary

Perayu telah menyaman responden dan individual lain ('Voon') di Mahkamah Tinggi kerana fitnah berdasarkan penegasan tertentu yang dibuat oleh responden dalam penyataan pembelaannya dalam guaman satu lagi di mahkamah sesyen antara pihak-pihak yang sama. Atas permohonan perayu dalam guaman tersebut, mahkamah sesyen telah membatalkan enam perenggan, dikatakan berunsur fitnah terhadap perayu, daripada penyataan pembelaan responden di situ. Responden tidak pernah merayu terhadap perintah pembatalan itu. Dalam tindakan fitnah Mahkamah Tinggi, responden telah memohon untuk membatalkan tindakan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KM') atas alasan bahawa penegasan yang dibuatnya dalam penyataan pembelaan dalam guaman lain itu dilindungi oleh perlindungan bersyarat. Mahkamah Tinggi bersetuju dan membatalkan tindakan itu. Dalam rayuan ini terhadap keputusan tersebut, perayu telah berhujah bahawa responden tidak dilindungi oleh perlindungan bersyarat setelah perenggan yang dipersoalkan dalam penyataan pembelaan dibatalkan oleh mahkamah sesyen dan dengan itu terhenti daripada menjadi sebahagian prosiding mahkamah.

Diputuskan, membenarkan rayuan, mengetepikan perintah pembatalan dan mengembalikan perkara itu kepada Mahkamah Tinggi untuk perbicaraan penuh:

(1) Isu sama ada responden berhak terhadap pembelaan perlindungan bersyarat perlu diputuskan selepas perbicaraan penuh. Berdasarkan fakta dan pliding, kes ini bukan suatu yang biasa dan jelas untuk pembatalan di bawah A 18 k 19 KM 2012. Tindakan ini bukan remeh atau menyusahkan, bahkan pliding tersebut bukan menyalahguna proses mahkamah (lihat perenggan 23–24).

(2) Ia adalah kes yang dipli perayu bahawa penyataan responden yang dipersoalkan itu terpesong daripada hal perkara tuntutan perayu terhadap responden yang berpremiskan tort kecuaian. Adalah dikatakan bahawa semasa kekecohan berlaku, perayu telah diserang oleh Voon selepas memecah masuk bilik hotel yang diduduki oleh perayu akibat perbuatan cuai responden. Mahkamah ini bersetuju bahawa penyataan yang dipersoalkan adalah tidak berasas, remeh, menyusahkan dan memalukan perayu dan patut dibatalkan oleh mahkamah sesyen (lihat perenggan 14).

(3) Walaupun penyataan yang dipersoalkan telah dibatalkan, ia terkandung dalam penyataan pembelaan yang difailkan di mahkamah dan oleh itu dibaca oleh staf mahkamah dan mereka yang hadir di mahkamah terbuka dan juga oleh staf dalam pejabat peguam cara responden. Walaupun fitnah yang dikatakan itu terhad kepada sekumpulan kecil orang sahaja, itu tidak patut dijadikan sebab untuk membatalkan writ dan penyataan tuntutan perayu terhadap responden (lihat perenggan 21).]

Notes

For cases on writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9563–9581.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Cornelius Jimbangan @ Mindolos v Joseph Crispin & Anor (Michael Persius Ubu, third party) [2009] 6 MLJ 82; [2009] 10 CLJ 87, HC (refd)

Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar [2001] 3 CLJ 65, CA (distd)

S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor [2010] MLJU 2218; [2011] 1 CLJ 460, CA (distd)

Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd [2013] 4 MLJ 545, CA (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19, 19(1)

Appeal from: Writ No AA-22NCVC-23–02 of 2018 (High Court, Ipoh)

Raam Kumar (Norleena Jamal with him) (KB Tan, Kumar & Partners) for the appellants.

James Huntzen Ong (Sukhvinder Singh Sidhu with him) (Chan & Assoc) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants/plaintiffs against the decision of the High Court at Ipoh in allowing the respondent/first defendant's application to strike out the appellants/plaintiffs' writ and statement of claim under O 18 r 19(1) of the Rules of Court 2012 ('the ROC 2012') with costs of RM5,000 in encl 13.

[2] We heard the appellants/plaintiffs' appeal on 9 January 2019 wherein at the end of it, we allowed the appeal with costs. We now give our reasons in doing so.

[3] For ease of reference the parties will be referred to in this judgment as they were described in the court below.

BACKGROUND FACTS

[4] The second defendant and the first plaintiff in the original suit were husband and wife but their marriage was never registered.

[5] This suit arose from an incident in which the second defendant broke into a unit in the first defendant's premise occupied by the plaintiffs, causing a commotion.

[6] The plaintiffs commenced a defamation suit against the first and second defendants in the original suit. The basis of their claim was based on the statement of defence filed by the first defendant in another suit vide Suit No AA-NCVC-3–01 of 2017 involving the same parties which was later transferred down to the sessions court and re-registered as No AA-A53–11–06 of 2017 in which the sessions court had expunged the impugned paras 5, 8, 9, 10, 11 and 12 of the first defendant's statement of defence upon an application made by the plaintiffs. This order of the learned sessions court judge was never appealed by the first defendant.

[7] The plaintiffs alleged that the first defendant had caused an embarrassment and had defamed them through the statement of defence filed by the first defendant. The plaintiffs considered the statements which were expunged by the sessions court to be defamatory and had tarnished their reputation.

[8] In the original suit, the plaintiffs claim against the defendants for the following reliefs:

A (a) general damages;

(b) exemplary damages;

(c) written unirrevocable apologies from the defendants;

B (d) undertaking not to repeat the same defamatory statements against the plaintiffs;

(e) compensation;

(f) costs based on the solicitors — client basis; and

C (g) other reliefs.

AT THE HIGH COURT

D **[9]** The defendants filed an application in encl 13 to strike out the plaintiffs' original suit on the ground that they were protected by absolute privilege. As we stated earlier, encl 13 was allowed by the learned High Court judge with costs.

E **[10]** In his brief written grounds of judgment, the learned presiding High Court judge relied on *S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor* [2010] MLJU 2218; [2011] 1 CLJ 460 (CA) and *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 before deciding that the statements contained in the first defendant statement of F claim fell squarely within the category of absolute privilege and were therefore insulated from defamation action. Hence, His Lordship held that the plaintiffs' claims against the first defendant disclosed no reasonable cause of action, was scandalous, frivolous or vexatious and was an abuse of the court process. Therefore the claim against the first defendant was unsustainable and ought to G be struck out with costs.

THE APPEAL

[11] Before us, learned counsel for the plaintiffs canvassed their main ground H of appeal was that the first defendant is not protected by the defence of absolute privilege once the relevant paragraphs in their statement of defence had been expunged by the sessions court by an order dated 4 October 2017 of which the first defendant had failed to appeal on. Learned counsel argued that a defence of absolute privilege only applies when a statement and/or evidence and/or I document made in the course of judicial proceedings and had been properly and regularly used for the proceeding. Since the impugned statements had been expunged and no longer part of the proceedings and was not even used for the purpose of the proceedings before the session court, the defence of absolute privilege is no longer available to the first defendant.

[12] Learned counsel for the first defendant on the other hand posited that the fact that the impugned statements had been expunged by the sessions court does not preclude the first defendant from the protection of absolute privilege. Learned counsel for the first defendant relied on *S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor*; *Cornelius Jimbangan @ Mindolos v Joseph Crispin & Anor (Michael Persius Ubu, third party)* [2009] 6 MLJ 82; [2009] 10 CLJ 87; *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] 3 CLJ 65.

[13] Before discussing the case law cited by learned counsel from both side, it is pertinent for us to look at the impugned statements contained in the first defendant's statement of defence which was expunged by the sessions court to see whether they were of defamatory in nature. Those statements were as follows:

Paragraph 5:

> Defendan Pertama menegaskan bahawa kebanyakan kakitangan Defendan Pertama mengenali Plaintif Pertama dan Defendan Kedua sebagai suami isteri seperti mana yang diketahui umum.

Paragraph 8:

> Defendan Pertama menegaskan bahawa Plaintif Kedua adalah seorang individu yang mempunyai isteri dan anak-anaknya melalui perkahwinan yang sah, dan Defendan Pertama dan kakitangannya pula hanya mengenali Plaintif Pertama dan Defendan Kedua sebagai suami isteri, pada segala masa yang material. Defendan Pertama memohon Plaintif Kedua untuk mengemukakan butiran berkenaan perkahwinannya yang sah dan anak-anaknya, semasa perbicaraan tindakan ini untuk membuktikan kepada Mahkamah, berkenaan sebab pertelingkahan dan pergaduhan berlaku di antara Plaintif Kedua dan Defendan Kedua. Defendan Pertama menegaskan bahawa pertelingkahan di antara Plaintif-Plaintif dan Defendan Kedua berlaku akibat hubungan sulit dan zina (adultery) di antara Plaintif-Plaintif dan dengan itu pergaduhan yang berlaku adalah berada di luar kawalan Defendan Pertama.

Paragraph 9:

> Defendan Pertama menegaskan bahawa ianya adalah tindakan Plaintif Ke-2 yang sanggup menetap di dalam bilik yang sama dengan isteri Defendan Ke-2 yang mencetuskan pergaduhan dan pertelingkahan di dalam kes ini. Defendan Pertama tidak mempunyai apa-apa pengetahuan berkenaan hubungan sulit dan zina ('adultery') di antara Plaintif-Plaintif ...

Paragraph 10:

> Defendan Pertama menyatakan bahawa Penyambut Tetamu Defendan Pertama telah memberikan kad akses kepada Defendan Ke-2 dengan anggapan bahawa Defendan Ke-2 ingin berjumpa isterinya yang menetap di bilik no: 1809, pada hari tersebut dan Penyambut Tetamu Defendan Pertama tidak mempunyai pengetahuan berkenaan hubungan sulit di antara Plaintif-Plaintif. Defendan

A Pertama tiada apa-apa niat lain selain membantu Defendan Ke-2 untuk pergi berjumpa dengan isterinya, yang dikenali oleh Penyambut Tetamu.

Paragraph 11:

Defendan Pertama menegaskan bahawa Defendan Pertama tidak pernah
B berdepan dengan kes melibatkan hubungan sulit yang ditangkap, sepertimana kes ini.

Paragraph 12:

Defendan Ke-2 telah amat marah dengan tindakan Plaintif Pertama yang
C didapati menjalin hubungan sulit dengan Plaintif Ke-2 yang juga adalah seorang yang telah berumahtangga. Defendan Pertama percaya bahawa Defendan Ke-2 akan mengemukakan Pembelaan yang sewajarnya berkenaan hubungannya dengan Plaintif Pertama ...

D **[14]** It was the plaintiffs pleaded case that those statements by the first defendant were diverted from the subject matter of the plaintiffs' claim against the first defendant which was premise on tort of negligence. It was alleged that during the commotion, the plaintiffs was assaulted by the second defendant after breaking and entering into hotel room occupied by the plaintiffs due to
E the negligence conduct of the first defendant. We agreed with learned counsel for the plaintiffs that the impugned statements were baseless, frivolous, vexatious and embarrass the plaintiffs and was rightly expunged by the learned sessions court judge. For that there was no appeal against by the first defendant.

F **[15]** The law on striking out under O 18 r 19 of the ROC 2012 is settled. A pleading should only be struck out if it is shown that it is on the face of it obviously unsustainable. It is only in a plain and obvious case this drastic power will be exercised by the court with the utmost caution. In the most often cited case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation*
G *Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, the Supreme Court said at p 43 (MLJ); p 11 (CLJ):

The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process
H under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see
I whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the

claims are frivolous or vexatious or that the defences raised are not arguable. A

[16] In *Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd* [2013] 4 MLJ 545 this court through Ramly Ali JCA (as His Lordship then was) said:

> Judges dealing with striking out application under O 18 r 19 of the RHC must always bear in mind that the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 350; [1985] CLJ Rep 45, had said that 'the inherently power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution'. It is a power which ought to be very sparingly exercised and only in very exception cases (per Lord Herschell in *Lawrence v Norry* — as cited *CC Ng & Brothers*).

B C D

[17] Learned counsel for the first defendant supported the learned trial judge's finding that the defence of absolute privilege was available to the first defendant. The learned trial judge as alluded to earlier relied on *S Ashok Kandiah* and *Ayob bin Saud*. Learned counsel for the first defendant further relied on *Cornelius Jimbangan* and *Mahadevi Nadchatiram*. In the later, James Foong J (as he then was) held that the submissions of defendant, however defamatory they were of the plaintiff, are protected by absolute privilege on the ground that these documents must be considered to be made in the course of legal proceedings. E F

[18] In *Cornelius Jimbangan*, involving third party proceedings brought in by the defendants into the suit. The third party counterclaimed against the defendants for damages and pleaded that the defendants' allegations in their statement of claim in the third party proceedings were baseless, malicious, defamatory and calculated to disparage him in his profession as an advocate and solicitor. The defendant on the other hand contended that the matters alleged by the third party to be defamatory were published on occasion of absolute privilege and therefore not actionable in a court of law. Abdul Rahman Sebli JC (now JCA) agreed with the defendant's contention that the defendants' statement of claim fell squarely within the category of absolute privilege and were therefore insulated from defamation action. G H

[19] In *Ayob bin Saud*, one of the issue raised was on publication of a letter written by the defendant to a third party containing the following paragraph: 'I am surprised that a Chinese Surveyor was charged $1,450 whereas a Bumiputra asks for $4,480 which is daylight robbery ...'. On the basis of the above letter, the plaintiff sued the defendant for damages for libel. This has got I

nothing to do with absolute privilege and does not involve pleadings filed in court proceedings.

[20] However before us in the present case, learned counsel for the first defendant did argue that the first defendant's statement of defence was never published and had not been brought to public arena. Learned counsel relied on the learned trial judge's judgment at p 85 of the appeal record Vol 1:

> Oleh itu, elemen penyebaran sesuatu pernyataan yang katakan memfitnah adalah suatu kemestian untuk dibuktikan. Berbalik kepada tuntutan pihak plaintif, pernyataan-pernyataan fitnah yang didakwa dilakukan berasaskan pernyataan pembelaan yang difailkan di dalam prosiding di mahkamah. Persoalannya, adakah tindakan memfailkan pernyataan pembelaan suatu bentuk penyebaran? Jawapannya sudah tentulah tidak. Pernyataan pembelaan hanya khusus untuk tujuan prosiding di mahkamah sahaja dan adalah didapati bahawa tidak wujud sebarang elemen penyebaran apabila melibatkan dokumen mahkamah.

[21] We are of the considered view that even though the impugned statements had been expunged but those statements were contained in the first defendant statement of defence filed in court. The impugned statements had been read in court by the court staff and those present in the open court as well as staff from the first defendant's solicitors office. We agreed that the defamation was confined to a small circle of people. That should not be the reason to strike out the plaintiffs' writ and statement of claim against the first defendant.

[22] This court in *Mahadevi Nadchatiram* had considered the same issue of publication at pp 96–97, where Haidar Mohd Nor JCA (as he then was) said:

> In considering an award for damages for defamation, we are guided by the long established factors as set out by the Federal Court in *MGG Pillai*'s case as was followed by the learned judge. They are:
>
> (1) The position and standing of the plaintiff.
>
> (2) The extent of the publication.
>
> (3) The mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel.
>
> (4) The uncertainty undergone in the litigation.
>
> (5) The conduct of the defendant from the time of the libel down to the very moment of the verdict.
>
> (6) The absence and refusal of correction, retraction or apology.
>
> In our view the extent of the publication is one of the relevant factors. In this case the defamation was confined to a small circle of people, that is, the court staff and those present in the Seremban High Court. It was not a publication to the public at large. We agree that the allegation of incest against the respondent was a serious one

and certainly would have caused distress etc to the respondent as a result thereof. However, we were advised that there was an attempt to settle but unfortunately failed possibly because of the strong personalities of the parties. Be that as it may, as stated earlier in this judgment, the root cause of all the problems is the squabbles amongst the siblings of the deceased over the distribution of the properties left by their deceased father.

[23] The case of *S Ashok Kandiah* relied by the learned trial judge in his ground of judgment as well as the case of *Mahadevi Nadchatiram* was decided after a full trial. There is a lot of difference from the present case before us. The two earlier cited cases above was never decided summarily. What matter most was that in the present appeal, the impugned statements had been expunged and no longer before the cognisance of the court. Furthermore, the first defendant's refusal to retract the impugned statements upon plaintiffs' request goes to show malice and bad faith on the part of the first defendant. We are of the view that the issue whether the first defendant entitled to the defence of absolute privilege should be decided by the learned trial judge after a full trial.

[24] Based on the facts and the pleadings filed in the instant case and based on competing affidavits and arguments of the parties, we are of the view that the present case is not a plain and obvious case for striking out under O 18 r 19 of the ROC 2012. We are also of the considered view that the present case is not frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that the pleadings are otherwise an abuse of the process of the court.

[25] Based on the aforesaid, we unanimously allowed the appeal with cost of RM10,000 here and below to be paid by the first defendant to the plaintiffs within 14 days subject to payment of allocator fees. We ordered the deposit to be refunded. The order of the High Court is set aside and the matter is reverted back to the High Court for a full trial.

[26] We therefore ordered accordingly.

Appeal allowed, striking out order set aside and matter reverted back to the High Court for full trial.

Reported by Ashok Kumar